

Suresh Narayan Gulawani and Others Vs Smt. Vimalabai

Court: Karnataka High Court

Date of Decision: June 30, 2005

Acts Referred: Karnataka Rent Control Act, 1961 & Section 211 J
Specific Relief Act, 1963 & Section 16, 20, 22, 27, 31

Citation: (2005) ILR (Kar) 3555 : (2005) 3 KCCR 2089

Hon'ble Judges: Huluvadi G. Ramesh, J

Bench: Single Bench

Advocate: Prabhuling K. Navadgi, for the Appellant; Balakrishna S. Shastry, for the Respondent

Final Decision: Allowed

Judgement

Huluvadi G. Ramesh, J.

This second appeal is filed by the defendants being aggrieved by the judgment and decree by the District Judge in

RA 326/1989 dated 28.2.2000 in setting aside the judgment and decree of the 1 Addl. Civil Judge, Belgaum in OS 105/1983 in so far as rejecting

the relief of specific performance of the contract.

2. Suit OS 105/1983 was filed by plaintiff/respondent before the Civil Judge, Belgaum for specific performance of contract against the defendants

in respect of the suit schedule property i.e., property in CTS 1438/1 measuring 91 x 14 sq.mtrs situate at Belgaum and also for a direction to

execute the sale deed in favour of the plaintiff accepting Rs. 17,000/- and put the plaintiff in possession of the property and in the alternative, to

pass a decree for refund of earnest money of Rs. 12,000/- with interest and to award compensation.

3. Defendants 1 to 3 and 5 are the owners of the suit property and defendant 4 is the general power of attorney holder for defendants 1 to 3 and

5. The suit property was agreed to be sold to the plaintiff for a sum of Rs. 29,000/- Accordingly, they entered into an agreement on 27.8.1997

and paid an advance of Rs. 2,100/- and agreed to pay a sum of Rs. 9,000/- within one month and the remaining balance consideration was agreed

to be paid at the time of registration of the sale deed. Meanwhile, as per the agreement, defendant 4 was required to obtain permission from the

Deputy Commissioner, Belgaum under the provisions of the Urban Land (Ceiling & Regulation) Act, 1976 and thereafter to inform the plaintiff to

execute the sale deed in terms of the suit agreement.

4. It is averred, though the plaintiff was ready to pay the balance consideration, the defendants were not ready and willing to execute the sale deed

and they did not also obtain the requisite permission from the Deputy Commissioner. Despite several attempts by the plaintiff to persuade in this

regard and having failed in her attempt, she filed a suit after issuance of notice.

5. The defendants resisted the suit stating that they have not authorised the 4th defendant to sell the property and defendant 6 had made some

illegal construction on the suit property and the plaintiff had filed a suit for mandatory injunction against defendant 6 for the unauthorised

construction and as such, 6th defendant was included as one of the party to the suit.

6. The 4th defendant has taken a contention that against the tenant in the suit premises, eviction proceeding was initiated as per Section 211-J of

the Karnataka Rent Control Act and has obtained an order of eviction and the tenant Sri Joshi filed a suit for restoration and by virtue of the order

of the Court, he was put in possession. As such, although an agreement was entered into, the contract had become unenforceable.

7. Based on the pleadings, the Trial Court has raised as many as thirteen issues. After evidence was let in and after hearing the parties, it has

dismissed the suit of the plaintiff in so far as specific performance. However, while partly decreeing, it has ordered to pay the balance advance

amount of Rs. 12,000/- with 6% interest from the date of suit till payment with a further direction to pay compensation of Rs. 10,000/- at 6%

interest.

8. Being aggrieved by the above said order, appeal was preferred before the District Judge, Belgaum which came to be disposed of by the III

Addl. District Judge in RA 326/1989 by order dated 28.2.2000 allowing the appeal in part thereby holding that plaintiff was entitled to specific

performance as per the suit agreement at Ex.P2 on receiving the balance consideration of Rs. 17,000/-. The Lower Appellate Court, has left open

the right of the plaintiff to take possession of the suit property and it is ordered that plaintiff is entitled to possession of the suit property. However,

the relief sought for actual possession was declined since the legal representatives of the tenant are said to be in possession. Being aggrieved by the

said order, the present appeal is filed by the defendants 1, 2, 3 and 5.

9. At the time of admission on 30.5.2000, the following substantial questions of law were raised:

1. Whether the Lower Appellate Court was right in holding that the plaintiff was ready and willing to perform his part of obligation in the facts of

the case?

2. Whether the decision of the Lower Appellate Court is against the principles of law laid down by the Division Bench of this Court in Saraswathi

Ammal Vs. V.C. Lingam, ?

10. Heard the counsel for the respective parties.

It is the submission of the Learned Counsel for the appellants, having regard to the nature of the controversy involved in the case on hand, the Trial

Court had rightly decreed the suit in part directing to repay the earnest money while rejecting the suit for specific performance and further

submitted that there is no averment as to readiness and willingness and also the plaintiff not having financial capacity to pay the sale consideration,

the Lower Appellate Court has not looked into the same. The 4th defendant was not competent to enter into a contract and the contract could

not be enforced since the premises was in the possession of the tenant. While ordering for specific performance, the Lower Appellate Court failed

to consider the implication of Section 16 of the Specific Relief Act, 1963 and it ought to have taken note of the rise in the price of the urban

property. Accordingly, he submitted that the order of the Lower Appellate Court is in violation of provisions of Section 20 and 22 of the Specific

Relief Act; that there was inordinate delay in filing the suit for specific performance and under such circumstances, the Lower Appellate Court

ought to have looked into the capacity of the plaintiff and should have upheld the order of the Trial Court. In support of his argument, learned

counsel has relied upon the following citations:

1. Veerayee Ammal Vs. Seeni Ammal,
2. A.C. Arulappan Vs. Smt. Ahalya Naik,
3. K. Narendra Vs. Riviera Apartments (P) Ltd.,
4. V. Muthusami by Lrs. Vs. Angammal and Others,
5. Lalit Kumar Jain and Another Vs. Jaipur Traders Corporation Pvt. Ltd.,
6. Joginder Pal Vs. Naval Kishore Behal,
7. R.C. Chandiok and Another Vs. Chuni Lal Sabharwal and Others,

11. Learned Counsel for the respondent tried to contend that readiness and willingness of the plaintiff to perform the contract is not a substantial

question of law and readiness and willingness does not necessarily refer to keep the money ready on the part of the intended purchaser and the

plaintiff has approached the Court well within time and time is not the essence of contract. Accordingly, he submitted that the Lower Appellate

Court has rightly decreed the suit for specific performance and that there is no substantial question of law involved in the case.

12. At the time of admission, as noted above, two substantial questions of law were raised. In this regard, as to readiness and willingness to

perform the contract, the Learned Counsel for respondents has relied upon the ruling reported in Veerayee Ammal Vs. Seeni Ammal, to contend

that the readiness and willingness to perform is not a substantial question of law. In this regard, it is to be noted that in the said case, it was so held

in the facts and circumstances of the said case and more over, there was a concurrent finding. As such, the Apex Court held that the same could

not be disturbed in second appeal. In the said case, the ratio laid down is as to ready and willingness to perform the contract cannot be in anyway

termed as a question of law much less a substantial question of law.

13. In view of the above, I may have to restrict to answer only the 2nd substantial question of law raised, having noted the background under

which the Trial Court dismissed the suit for specific performance while granting alternative relief of refund of the earnest money as per the contract.

14. The substantial question of law raised refers to the decision reported in Saraswathi Ammal Vs. V.C. Lingam, , wherein it specifically refers to

Section 20 of the Specific Relief Act, 1963.

15. The Lower Appellate Court while ordering for specific performance did not consider the impact of Section 20 in the proper perspective. It has

considered the point raised by it at point No. 5 whether the discretion exercised by the Trial Court in refusing specific performance of the

agreement Ex.P2 is justifiable in the circumstances of the case. Of course, the Lower Appellate Court did not discuss this aspect independently

rather, it has discussed it along with the points, whether the Trial Court is justified in recording the finding that the plaintiff has not demonstrated

readiness and willingness and laid much emphasis on the latter aspect.

16. As per the agreement which is at Ex.P2 the plaintiff is said to have paid an amount of Rs. 2,100/- and the agreement is dated 27.8.1977.

Another sum of Rs. 9,900/- was to be paid within one month and that is said to have been paid as per Ex.P3. In all a sum of Rs. 12,000/- was

said to be paid. The remaining amount of Rs. 17,000/- was to be paid by the plaintiff as part of his obligation to get the sale deed executed.

Although, I would not proceed to discuss on the aspect as to the readiness and willingness on the part of the plaintiff to perform his part of the

contract, but, it would be appropriate to note while answering the substantial question of law raised, as to how the courts below have considered

this aspect. The Trial Court on the ground that there was a decree against the plaintiff in the money suit filed wherein she has sought for installment

to repay, has opined that the plaintiff was not ready to perform her part of the obligation.

17. As per the terms of the agreement at Ex.P2, the 4th defendant being the alleged power of attorney for defendants 1 to 3 and 5, had to obtain

the permission from the Deputy Commissioner, Belgaum as per the Urban Land (Ceiling & Regulations) Act, 1976. On obtaining such permission

and upon such information to the plaintiff, the sale deed had to be executed.

18. In the above background, having discussed that 4th defendant was not in a position to approach the plaintiff by obtaining such permission, the

Appellate Court has held that it could not have expected that the plaintiff should always be ready and willing to perform her part of the contract

rather, her willingness has to be exhibited after obtaining such permission. Referring to Ex.P6 that is dated 4.7.1982, it has held that the plaintiff had

met the 4th defendant on that day near the bus stand and he had entrusted the documents to the bond writer to prepare the document and this

aspect has not been disputed which indicates that the plaintiff had demonstrated that she was willing to discharge her part of the obligation. This act

of the plaintiff in admitting that she was willing to perform her part of the obligation by way of readiness is said to be during July 1982 nearly after a

lapse of five years from the date of the alleged agreement. Obtaining permission by the 4th defendant from the Deputy Commissioner before

executing the sale deed was said to be delayed as is expressed in Ex.P8 i.e., reply to legal notice at Ex.P11 to the effect that defendants could not

move the competent authority seeking for permission apprehending that the tenant of the suit property would object for issuance of such no

objection certificate. Of course this has not been accepted by the Lower Appellate Court on the ground that the tenant had not intended to

purchase the suit property at any time and he was only interested in possession. On the ground that it is impossible to perform the contract as they

could not get the possession of the suit property, defendants have contended that contract could not be enforced.

19. The 4th defendant was entrusted with the power of attorney as per Ex.P1 during the year 1969 May wherein with the said power of attorney,

he was authorised to get the tenant evicted from the suit property, of course by filing an application u/s 211-J of the Karnataka Rent Control Act

i.e., for the purpose of demolition and reconstruction application was filed and possession was obtained from the tenant. In the meanwhile, since no

reconstruction took place, the tenant once again filed an application and there was restoration of possession.

20. Ex.P1 is said to be the power of attorney which is said to be executed by defendants 1 to 3. According to them, it was only to deal with the

landed properties and not the suit property and they have not authorised the 4th defendant to execute the sale deed in favour of the plaintiff. In this

regard, the substantial question of law raised by the defendants 1 to 3/ appellants in the appeal memo is that the Courts below are not justified in

interpreting Ex.P1 so as to confer authority upon the 4th defendant to execute the sale agreement as per Ex.P1. What is being noted by the Lower

Appellate Court is that none of the defendants 1 to 3 entered the witness box to deny the authorisation in favour of 4th defendant as per Ex. P1.

Further, Lower Appellate Court has held that as per the wordings of Ex.P1, lands as mentioned in Ex.P1 includes the suit property. Since the

defendants did not enter the witness box to prove their contention, the said finding of the Trial Court and the Lower Appellate Court that the

defendant 4 was authorised to deal with the suit property also cannot be interfered with as it is more a question of fact.

21. According to defendants 1 to 3, they never intended to sell the suit property. The sale agreement is of the year 1977. On the ground that there

is non-performance of the contract by the defendants, the suit is filed in the year 1983 after a lapse of nearly six years from the date of the

agreement. It is noted that as per the finding of the Trial Court, the plaintiff was not ready and willing to perform her part of the contract. On the

contrary, as noted above, the Lower Appellate Court stating that the defendants have not obtained the No Objection Certificate/permission from

the Deputy Commissioner to execute the sale deed, and that till such compliance by the defendants are shown, it was not required for the plaintiff

to show that she was ready and willing to perform her part of the contract and that she was ready to perform though the plaintiff had suffered a

money decree and that she sought for installments to pay the decreed amount.

22. Ex.P6 is said to be of the year 1982 wherein the plaintiff is said to have made up her mind to get the document prepared for the purpose of

getting the sale deed executed. In this regard, it is to be noted that readiness and willingness though is pleaded by the plaintiff at every stage from

the date of entering into agreement, the readiness that could be inferred is only during 1982 i.e., after lapse of five years. Except that it is stated that

she was ready to perform her part of the obligation, no such steps have been taken by way of issuance of notice in between the said period i.e.,

before June 1982. Only notice at Ex.P11 is issued on 28.7.1980 and subsequently the suit was filed in the year 1983. Thus, almost it has taken

nearly six years to institute the suit when the defendant replied the notice at Ex.P8 under which the defendants have stated they could not move the

Deputy Commissioner for No Objection Certificate since the tenant is likely to object for issuance of the same. On this aspect, the Lower

Appellate Court has emphasized much stating that the defendants have not performed their part of the obligation and thereby stated that plaintiff

was not expected to be ready with the balance consideration since permission was not obtained and her capacity to pay the same could not be the

basis for judicial scrutiny since the cause of action did not arise.

It appears, as per the conduct of defendants 1 to 3, they had executed power of attorney in favour of 4th defendant to get the suit premises

vacated from the tenant and also obtained a decree and thereafter the tenant in turn, has taken back the possession on the ground that there was

no such positive act of demolition and reconstruction as per the order. In this situation, it is the case of the defendants that the contract is

unenforceable for want of possession and also that they did not authorise the 4th defendant to execute any such sale agreement as per Ex.P2.

However, the Lower Appellate Court except discussing as to the circumstances to hold that the plaintiff was ready and willing to perform her part

of the contract while reversing the finding of the trial court, it did not consider the mandate of Section 20 of the Specific Relief Act.

23. In the case of Saraswathi Ammal Vs. V.C. Lingam, it is held thus:

While exercising the discretion u/s 20 of the Specific Relief Act, Court should see that it is not used as an instrument of oppression to have an

unfair advantage to the plaintiff and the Court is not bound to grant specific performance merely because it is lawful to do so.... The burden of

proving the readiness and willingness to perform his part of the contract is entirely on the plaintiff and he cannot succeed in his claim for a decree

for specific performance, by establishing that the vendor-defendant was avoiding to perform the contract; defendants's failure to perform his part

of the contract is the cause for the suit; but, to succeed in the suit, plaintiff has to prove his readiness and willingness. The readiness involves proof

of capacity to perform, which in turn requires proof of his financial ability at the relevant point of time. The willingness to perform the contract is not

a mere desire; it should be a genuine willingness, to be proved like any other fact; circumstances may justify an inference that the assertion of the

plaintiff as to his willingness is a mere verbal assertion and as a fact, his conduct may disclose that he was really interested in procrastination,

because, delay was to his advantage.... Even at the time of filing the suit and at the time of hearing the case before the trial Court, plaintiff has not

shown his readiness and willingness to be genuine; it is entirely unclear as to where he kept the sum of Rs. 80,000/- and how he got it; it is

reasonable to infer that his ability to make the payment on the relevant dates has not been proved.... In view of the above, we are constrained to

reverse the judgment and decree under appeal resulting in the dismissal of the suit.

Based on the above ratio, the second substantial question of law has been raised. Admittedly, the Lower Appellate Court did not consider the

delay in filing the suit by the plaintiff from the time of agreement till the filing of the suit i.e., for nearly six years. Except that the Lower Appellate

Court tried to find fault with the defendants in not getting the no objection certificate, it did not consider the conduct of the plaintiff regarding the

filing of the suit after nearly lapse of six years from the date of the agreement. If really the plaintiff was ready to act upon, she would have filed a suit

even well within six months from the date of the agreement after pressing the defendants to secure such no objection certificate on their refusal or

on their non-performance. In the process of allegations and counter allegations between the parties, six years have elapsed and thereafter, suit has

been filed.

24. In the decision in A C Arulappan v. Ahalya Naik (supra) it is held thus:

Granting of specific performance is an equitable relief, though the same is now governed by the statutory provisions of the Specific Relief Act,

1963. These equitable principles are nicely incorporated in Section 20 of the Act. While granting a decree for specific performance, these salutary

guidelines shall be in the forefront of the mind of the Court. The Trial Court, which had the added advantage of recording the evidence and seeing

the demeanor of the witnesses, considered the relevant facts and reached a conclusion. The Appellate Court should not have reversed that

decision in its decision. Therefore, we hold that the respondent is not entitled to a decree of specific performance of the contract.

25. In the case of K. Narendra v. Riviera Apartments(P) Ltd-(supra) in para 35 of the said judgment, it is held that ""there has been a default on the

part of the respondents in performing their obligations under the contract. The period lost between the date of agreement i.e., on 25.7.1972 and

the year 1979 and 1980 when the litigation commenced, cannot be termed as a reasonable period for which the appellant could have waited

awaiting performance by the respondents though there was not a defined time limit for performance laid down in the agreement.... The contract

though valid at the time when it was entered, is engrossed in such circumstances that the performance thereof cannot be secured with precision"".

26. In the decision reported in V. Muthusami (Dead) By Lrs-Angammal And Others (supra) referring to Section 20 of the Specific Relief Act, it is

held thus:

Now the question is, to what relief is the plaintiff entitled? It is settled position of law that grant of a decree for specific performance is a

discretionary one. This Court in K Narendra V Riviera Apartments (P) Ltd held that Section 20 of the Specific Relief Act, 1963 provides that the

jurisdiction to decree specific performance is discretionary and the Court is not bound to grant such relief merely because it is lawful to do so the

discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles. It was further held that if performance of a contract

involves some hardship on the defendant which he did not foresee while non-performance involving no such hardship on the plaintiff, is one of the

circumstances in which the Court may properly exercise discretion not to decree specific performance and the doctrine of comparative hardship

has been statutorily recognized in India.

27. In the case of Lalit Kumar Jain and Anr. v. Jaipur Traders Corporation Pvt. Ltd- (supra) in para 13 it is held thus :

One more fact which disentitles the plaintiff to the equitable relief under Sections 27/31 of the Specific Relief Act is the unexplained delay in filing

the suit after the exchange of notices in September 1973. Almost three years later, the suit was filed. This inaction has its own revelation. Either the

plaintiff did not stand by his declaration to rescind the contract, as held by the Trial Court, or the plaintiff was sitting on the fence and waiting to see

whether the turn of events would be to his advantage or disadvantage.

28. The above equitable principles is laid down referring to Section 20 of the Specific Relief Act and also reference is made to the time gap from

the date of agreement till commencement of the litigation which definitely place the Respondent in this case, in an advantageous position. In the

factual background and circumstances of the case, while examining the aspect of readiness and willingness on the part of the plaintiff, when the

Trial Court had held that plaintiff was not ready and has rejected the claim of plaintiff, the Lower Appellate Court although on a different reasoning,

reversed the finding of Trial Court on that aspect, and the Lower Appellate Court has erred in not considering the mandate of Section 20 of the

Specific Relief Act. Further more, it failed to take note of the time gap between the date of agreement and date of filing the suit which was almost

after a period of six years and, which has placed the plaintiff in an advantageous position to gain time to secure the balance amount of consideration

and plaintiff was placed in a unfair advantageous position which also leads to unjust enrichment.

29. The approach of the Lower Appellate Court in ordering for specific performance, appears to be not guided by judicial principles, it has also

failed to take note of the conduct of the parties, especially the conduct of the plaintiff in not pursuing the litigation at the earliest point of time which

gives her an unfair advantage over the defendant.

30. Learned Counsel for the respondent, in support of his argument, has relied upon the decisions reported in R.C. Chandiok and Another Vs.

Chuni Lal Sabharwal and Others, , Motilal Jain Vs. Smt. Ramdasi Devi and Others, ; ILR 1995 KAR 493; Nathulal Vs. Phoolchand, ; Lt. Cdr.

M.C. Kendall Vs. S. Chandrasekhar, ; K.S. Vidyanadam and Others Vs. Vairavan, : ILR 2001 KAR 3870; Prakash Chandra Vs. Angadlal and

Others, .

The decisions which are relied upon by the counsel for the respondent refers to the fact of exercising discretion as per Section 20 of the Specific

Relief Act. Section 16 of the said Act regarding ready and willingness and other aspects of hardship which are not beneficial to advance the case

of the respondents. Rather, in the decision relied upon by the counsel in K.S. Vidyanadam and Others Vs. Vairavan, it is held that inaction on the

part of the purchaser for 2 1/2 years would be inequitable to order for relief of specific performance. In the said decision, the delay coupled with

the substantial rise in price brought about a situation where it would be inequitable to give the relief of specific performance.

31. While answering the above substantial questions of law raised, it has to be held that the Lower Appellate Court has committed an error in not

exercising the discretion properly while ordering for specific performance. It also erred in not considering the mandate of Section 20 of the Specific

Relief Act and the time gap between the date of agreement till the commencement of litigation. It has also failed to take note of the fact that the

property is situate in the heart of Belguam City and the time gap in the interregnum of ordering for specific performance while reversing the finding

of the Trial Court, from the date of agreement till the commencement of litigation and thereafter till the judgment is rendered, places the plaintiff in

an advantageous position thereby, according her unfair advantage over the defendants.

32. In view of the above detailed discussion, the appeal is allowed. The judgment and decree passed by the Lower Appellate Court is reversed

while confirming the judgment and decree passed by the trial Court. Parties to bear their own costs in this appeal.